In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1042

ERVIN W. STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 471 F. 2d 170. The opinion and order of the district court denying a motion for a new trial (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1972. A petition for rehearing was denied on January 3, 1973 (Pet. App. B). The petition for a writ of certiorari was filed on January 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission in evidence of a pistol that had probative value with respect to important trial issues violated petitioner's right to a fair trial because it was not

the weapon used in the bank robbery with which he was charged.

2. Whether the search of a residence occupied jointly by petitioner and his wife, to which his wife had freely and voluntarily consented, was lawful even though the agents did not request petitioner's consent to conduct it.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of armed bank robbery (18 U.S.C. 2113(d)). On July 30, 1971, he was sentenced to 15 years' imprisonment subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed, with one judge dissenting (Pet. App. A).

The evidence, the sufficiency of which to support the conviction is not disputed by petitioner, is summarized in the majority opinion below (at Pet. App. A1-A3) and need not be restated.

ARGUMENT

1. Petitioner contends that the admission in evidence of a pistol found under a mattress in his home at the time of his arrest deprived him of a fair trial because it was not the weapon used in the robbery (Pet. 2, 5-7). The claim, which was not addressed by the dissenting judge, is correctly answered in the majority opinion below (at Pet. App. A3-A5), on which, as to this point, we rely. For the reasons there stated the pistol had high probative value in corroborating the testimony of government witnesses on other issues, even though it was not the

robbery weapon—a fact which distinguishes the decisions relied on by petitioner (Pet. 6-7).[1]

It should be noted that the pistol was not one of the items of evidence seized pursuant to the consent search—the subject of petitioner's second contention (*infra*). The legality of the pistol's seizure is not in dispute.[2]

2. Petitioner's only other contention—and the only claim as to which the court below was divided—is that certain other evidence was unlawfully seized (Pet. 2, 7-8). The principal evidence involved, and the only evidence specifically complained of (Pet. 4; cf. Pet. App. A8), was a tackle box containing duplicate copies of some of the money orders into which petitioner, in his travels with witness Skelton to various cities in Illinois and Iowa, had converted a portion of the money alleged to have been stolen (Pet. App. A3; Tr. 315-318, 364). As the majority below noted (Pet. App. A5-A7), the evidence was seized in the course of a search of the residence jointly occupied by petitioner and his wife after his wife had expressly and without coercion consented.[3]

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[1] *Moore* v. *Illinois*, 408 U.S. 786, 798-800, the directly pertinent decision of this Court cited by the court below (Pet. App.A4), is not distinguishable on the ground suggested by petitioner (Pet. 5). There is no indication in *Moore* that the shotgun there involved was illegally possessed, or that the question whether its possession was lawful or unlawful was considered relevant by this Court.

[2] The pistol was seized incidentally to petitioner's arrest, pursuant to an arrest warrant, in a bedroom of his home. Petitioner's wife had led the arresting agents to the bedroom after admitting them in response to their midday knock. The loaded gun was found under the mattress of a bed on which petitioner lay asleep when he was apprehended (Tr. 304-305, 332-334, 337, 341, 343-344). Cf. *Chimel* v. *California*, 395 U.S. 752, 763.

"Tr." refers to the trial transcript (in two consecutively paginated volumes), a copy of which is being lodged herewith.

[3] The dissent does not question the voluntariness of Mrs. Stone's consent; nor does petitioner in this Court. We rely, in any event, on the majority's discussion as to that question.

It is settled that, where two persons have equal rights to the use or occupation of premises, either may consent to a search, and evidence thus discovered may be used against either. *United States* v. *Thompson,* 421 F.2d 373, 375-377 (C.A. 5), vacated on other grounds, 400 U.S. 17; *United States* v. *Johnson,* 413 F. 2d 1396, 1400 (C.A. 5); *United States* v. *Mackiewicz,* 401 F. 2d 219, 223-224 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Alloway,* 397 F. 2d 105, 108-110 (C.A. 6); *Nelson* v. *People of State of California,* 346 F. 2d 73, 77 (C.A. 9), certiorari denied, 382 U.S. 964; *Roberts* v. *United States,* 332 F. 2d 892 (C.A. 8), certiorari denied, 380 U.S. 980; *Stein* v. *United States,* 166 F. 2d 851, 855 (C.A. 9), certiorari denied, 334 U.S. 844; see, also, *Coolidge* v. *New Hampshire,* 403 U.S. 443, 487-490, where this Court upheld the use against a husband of evidence voluntarily given to the police by his wife after she invited them into the jointly occupied home.[4] Mrs. Stone, who shared control of her home with her husband, thus had authority to permit law enforcement officers to search it.

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[4] The cases cited all involved spouses. The principle has also been applied, however, to persons related otherwise than as spouses. See, *e.g., Frazier* v. *Cupp,* 394 U.S. 731, 740 (joint user of duffel bag has authority to consent to its search, and evidence found may be introduced against the other user); *Gurleski* v. *United States,* 405 F. 2d 253, 260-262 (C.A. 5), certiorari denied, 395 U.S. 981; *Pasterchik* v. *United States,* 400 F. 2d 696, 699 (C.A. 9), certiorari denied, 395 U.S. 982; *Anderson* v. *United States,* 399 F. 2d 753 (C.A. 10); *United States* v. *Airdo,* 380 F. 2d 103, 105-107 (C.A. 7), certiorari denied, 389 U.S. 913; *Drummond* v. *United States,* 350 F. 2d 983, 989 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States,* 384 U.S. 944; *Maxwell* v. *Stephens,* 348 F. 2d 325, 334-338 (C.A. 8), certiorari denied, 382 U.S. 944; *Burge* v. *United States,* 342 F. 2d 408, 412-413 (C.A. 9), certiorari denied, 382 U.S. 829; *United States* v. *Sferas,* 210 F. 2d 69, 73-75 (C.A. 7), certiorari denied as to other issues *sub nom. Skally* v. *United States,* 347 U.S. 935. And see *Bumper* v. *North Carolina,* 391 U.S. 543, 548 n. 11.

The rationale of the rule is not, as the dissenting judge suggested (Pet. App. A15), that one can assume the absent occupant would himself have consented if he had been present, nor is it that the consenting occupant, acting as "agent," waives the other's rights. Rather, the theory is that, since each occupant has full access to the premises, he can waive his *own* rights and permit law enforcement officials lawfully to search those premises. The absent spouse must be deemed to bear the risk that such a search might be authorized. See *Roberts* v. *United States, supra,* 332 F. 2d at 896-897.

It is true, of course, as this Court has pointed out, that the Fourth Amendment "protects people, not places" (*Katz* v. *United States,* 389 U.S. U.S. 347, 351) and that the right to be free from unreasonable searches does not depend upon "subtle distinctions, developed and refined by the common law in evolving the body of private property law * * *" (*Jones* v. *United States,* 362 U.S. 257, 266). But this is not a case of property right distinctions. Cf. *Maxwell* v. *Stephens,* 348 F. 2d 325, 337 (C.A. 8), certiorari denied, 382 U.S. 944. It is not disputed that petitioner's wife, as joint occupant with her husband of their common residence, had full and equal right of access to every part of the premises and to invite whom she chose to enter.

The reason the dissenting judge considered the search here unreasonable was that the agents could readily have requested petitioner's consent to conduct it and did not (Pet. App. A15-A16). But the decisions suggest no such limitation on the right of one properly in control of jointly occupied premises to permit a search by law enforcement officials, or on the right of the officers to act pursuant to the authorization. In *United States* v. *Airdo,* 380 F. 2d 103, 106-107 (C.A. 7), certiorari denied, 389 U.S. 913, the court below (speaking through the pre-

sent dissenter) acknowledged the validity of the third-party consent rule and commented that the applicable consideration was not any agency concept but the reasonableness under the circumstances of a search consented to by a person having immediate control of the premises searched. The dissent quotes the *Airdo* comment with approval (at Pet. App. A11-A12), but concludes that the reasonableness test was not met here for the reason noted. It is significant, however, that in the very case which *Airdo* cited (380 F. 2d at 107) as illustrative in this connection—*Roberts, supra,* 332 F. 2d at 894—the nonconsenting party was, as here, in custody when the authorization to search was obtained, so that his consent could have been sought as readily as could petitioner's. This was also the situation in several of the other decisions cited by the dissent (Pet. App. A12) and by petitioner (Pet. 8) as involving reasonable third-party consent searches. *Pasterchik* v. *United States,* 400 F. 2d 696, 698 (C.A. 9), certiorari denied, 395 U.S. 982; *Anderson* v. *United States,* 399 F. 2d 753, 754 (C.A. 10); *United States* v. *Alloway, supra,* 397 F. 2d at 107. Cf. *Maxwell* v. *Stephens, supra,* 348 F. 2d at 335.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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